BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband	)	**WT Docket No. 17-79**
Deployment by Removing Barriers	)	
to Infrastructure Investment	)	

COMMENTS OF TRIANGLE COMMUNICATION SYSTEM, INC.

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Summary

Triangle Communication System, Inc. applauds the Commission's decision to review its Section 106 tower approval process to relieve unnecessary regulatory burdens imposed by that process. The *NPRM* seeks ways to update the Commission's approach to the NHPA. With all due respect, a new approach to the Section 106 review process as suggested in the *NPRM* is not needed. The Commission could merely enforce existing Section 106 requirements and huge strides would be made toward streamlining what has become a monumental regulatory approval exercise. Environmental review practices, needlessly generated by the Commission and the industry have developed over time which are contrary to the plainly stated environmental processing rules.

For instance, the Commission has a requirement that substantial written evidence must exist before a tower project can be slowed by further historic review, yet the Commission staff and SHPOs routinely slow Section 106 review upon mere claims that "unanticipated discoveries" might exist. Tower construction is thus slowed even though there is no substantial evidence that ground disturbance would harm any artifact; tower builders are slowed by "nothing."

The Commission long ago determined that ground disturbances associated with tower construction are not communications related, are insignificant environmentally, and that no concern exists where the land is previously disturbed which could easily be read to mean land which has been farmed or ranched. Yet the Commission, and by extension SHPOs, routinely treat tower construction ground disturbances as significant environmental undertakings even though they are not "Federal undertakings."

The Commission should also clarify that short towers which do not require ASR registration are exempted from Section 106 review because such towers are not "federal undertakings" even if such towers are voluntarily registered in the ASR database. If an ASR-exempted tower is otherwise categorically exempted from environmental processing, then tower construction may proceed

without SHPO, THPO, or Commission notice or approval. *See CTIA v. FCC*, 466 F.3d 105, 114 n. 4 (D.C. Cir. 2006); 47 C.F.R. § 1.1306(a),(b).

The ACHP long ago determined that the NHPA does not require the payment of any Section 106-related fees to Tribal authorities. The rule is that if payment is demanded the tower builder may proceed with erecting the tower. Yet it is now routine for tower builders to receive Tribal payment demands as compensation for Tribal environmental review and tower erection monitoring activity and that tower activity grinds to a halt if those fees are questioned. The Commission must clearly state that Tribal fee demands are statutorily and Constitutionally improper and that imposition of some sort of negotiated or cost-based fee schedule does not ameliorate that impropriety.

The Commission's historic review authority is limited to Federal undertakings which might affect things "that are listed, or are eligible for listing, in the National Register of Historic Places." 47 C.F.R. § 1.1307(a)(4); 54 U.S.C. § 300308. However, the Commission has come to treat the historic issue as if it were a study of history generally rather than something which meets the standard for listing in the National Register of Historic Places. Even the *NPRM* at ¶¶ 25, 28, 30, 34, 39, 44, 46, 54-57, 66-69, 71, 72, 75, 78, 79, 82, and nn. 115, 139, 150, 158 (and additional places in the addenda to the *NPRM*) presents the issue in the context of whether a tower proposal might affect "historic property(ies)" without making clear that the legal standard is whether the proposed tower construction might affect National Register eligible properties.[1]

One way to streamline the tower building environmental review process would be to recognize that the Federal government is a limited one which has no general land use power granted

[1] The *NPRM* references the National Register requirement at ¶¶ 70, 74, and nn. 59, 65, 100, 152, but the requirement is not presented as a central concern of the historic review process.

by the Constitution, that function is reserved to the States. Yet the Commission's established Section 106 environmental review process puts the burden of dealing with Tribal concerns on tower builders when a much more efficient, and Constitutionally sound, approach would have Tribes make their concerns known to the SHPOs using the SHPOs' comment timing requirements. It is common for Tribes never to respond to tower review requests which are submitted to them. After the SHPO determines that there is no substantial evidence that a tower project might affect property eligible for inclusion in the National Register, the Section 106 review process ends and there is no further need to address THPO claims or concerns. Moreover, this "government to government" approach better recognizes Tribal sovereignty compared to the currently employed "company to government" approach, an approach which puts companies in a position where their need for speed can be leveraged against them by improper Tribal demands for environmental review fees.

Notwithstanding the foregoing, the entire environmental review regulatory scheme which seeks to regulate tower building activity on private land is fraught with statutory and constitutional problems. First, the literal text of the NHPA states that the Federal government's function is to "encourage" the private sector property owners to consider history; except in very limited cases, the NHPA does not impose any legal obligation on private property owners to do anything except provide notice. Second, the Constitution does not grant to the Federal government a general land use power, that function is reserved to the States under the 10th Amendment. Because the artifacts which might be found on or in private property have no relation to interstate commerce or to telecommunications, the NHPA cannot be read as granting the Commission any authority to regulate how those private properties are handled even if ground disturbances caused by tower construction were properly considered a Federal undertaking.

Triangle Communication System, Inc. ("Triangle"), by its attorney, and pursuant to 47 C.F.R. § 1.415 and § 1.419, and pursuant to the April 21, 2017 *Notice of Proposed Rulemaking and Notice of Inquiry* ("*NPRM*") (FCC 17-38) which established initial and reply comment filing deadlines, and pursuant to the May 26, 2017 *Order* (DA 17-525) which extended those filing deadlines to June 15, 2017 and July 17, 2017 respectively, hereby submits its initial comments in the captioned proceeding. In support whereof, the following is respectfully submitted:

A. Triangle's Background

Petitioner is a non-nationwide, rural carrier which has been providing rural areas in North-Central Montana with wireless services, including Part 22 Cellular, Part 24 PCS, and Part 27 700 MHZ, since the mid-1990s. Over the course of that period of time Triangle has constructed approximately 29 communications towers ranging in height from under 200 feet AGL to as high as 305 feet AGL. Triangle's communications tower construction experience predates 1) the various nationwide programmatic agreements which establish a tower builder's relationships with State Historic Preservation Offices ("SHPO") and Tribal Historic Preservation Offices ("THPO"); 2) the Commission's implementation of the tower registration procedures found at 47 C.F.R. § 17.4, including the Tower Construction Notification System ("TCNS").

While Triangle's tower building experience does not predate the environmental and historic requirements found at 47 C.F.R. § 1.1301 *et seq*. (Procedures Implementing the National Environmental Policy Act of 1969) (the "Section 106 Review Process"),[2] Triangle's experience over

[2] These rules regulate the environmental and historic aspects of tower construction. In addition to the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq*.) ("NEPA") the Commission's § 1.1301 rule series also implements the National Historic Preservation Act of 1966 (54 U.S.C. § 300101 *et seq*. – National Park Service and Related Programs – National Preservation Programs) ("NHPA"). The NHPA was recently moved from Title 16 with minimal changes. *See* www.achp.gov/nhpa.pdf Over time the purpose of the NHPA has become lost and as a result tower builders are burdened by unnecessary legal requirements. This rulemaking proceeding provides an opportunity for the Commission to make a much needed regulatory course correction.

the past 20 years[3] is that the Commission's tower approval process has become increasingly, and unnecessarily, more complex as it relates to "historic preservation." The Commission has seemingly viewed its historic preservation function, as it relates to tower construction, as something which evolves over time even though the underlying NHPA statute remains substantially unchanged. With all due respect, the Commission seems to have lost sight of the purpose of the NHPA, lost sight of the directions provided by Congress, lost sight of its own environmental processing rules, failed to provide proper guidance to an industry which is regulated by a raised eyebrow and required to act out of an abundance of caution, and lost sight of the Constitutional requirement that the Federal government must exercise only those powers found in the Constitution.

B. With Limited Exception NHPA Does Not Regulate Privately Owned Land

Triangle certainly appreciates the Commission's invitation to comment on its reconsideration and possible revamping of its approach to the Section 106 Review Process in an effort to expedite tower approvals. The Commission has plainly reopened all issues relating to the Section 106 Review Process. *CTIA v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006).

For the purposes of this rulemaking proceeding the salient purposes of the NHPA are to 1) "administer federally owned, administered, or controlled historic property[4] in a spirit of stewardship for the inspiration and benefit of present and future generations;" and 2) "contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means *** encourage the public and private preservation and utilization of all usable elements of the Nation's historic built

[3] Triangle's counsel signing below has been practicing law before the Commission since 1985 and has assisted in meeting the legal requirements of numerous tower builds over that time.

[4] Collectively referred to as "Federal property" herein and includes Qualifying Tribal Land as that term is defined at 47 C.F.R. § 1.2110(f)(3)(i) except that telephone subscription rates shall not be considered. In general terms, Tribal Land is land that is Federally recognized as Tribal Land.

environment." 54 U.S.C. § 300101.[5] The NHPA recognizes two basic legal principals: First, the Federal government may administer and regulate Federal property. Second, the Federal government cannot regulate privately owned land, although it can "encourage" private parties to employ historic preservation measures.[6] Absent a potential substantial effect upon Federal property, the Federal government can exercise no authority over private land use under the NHPA.

Under limited circumstances the NHPA allows for the designation of private property as "National Historic Landmarks" in the National Register of Historic Places published annually in February. 54 U.S.C. §§ 302101-302108. However, the Federal government's powers are limited and there is no enumerated power in the Constitution which grants Congress or Tribal authorities the power to regulate privately owned land. Land use is a prerogative reserved to the States and protected by the Tenth Amendment and the NHPA is unconstitutional to the extent that it is applied to circumvent State land use authority.

In any event, very little private property in Montana meets the conditions for National Register designation. Accordingly, the Commission's focus can turn to the circumstance which encompasses vastly more land area and buildings where Federal power does not even arguably exist – privately owned real and personal property which a SHPO determines lacks historic significance thereby making it ineligible for inclusion in the National Register of Historic Places.[7] The purpose of the Section 106 Review Process is to determine whether a property which might be eligible to be

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[5] Title 54 of the United States Code is entitled National Park Service and Related Programs.

[6] The Commission's authority to regulate land use must emanate from NHPA and NEPA because the Communications Act does not provide the Commission with authority over land use.

[7] Powers which are not given to the Federal government, and which are not prohibited to the States, are reserved to the States. 10th Amendment. Land use regulation is reserved to the States. Accordingly, THPO consultation can be "encouraged" by the Federal government, but it cannot be a legal requirement imposed upon tower builders unless Federal or Tribal property is affected.

included in the National Register of Historic Places might be affected by construction of a proposed tower. 47 C.F.R. § 1.1307(a)(4)(i); 54 U.S.C. § 300308;[8] *NPRM*, ¶ 28. Once the SHPO, as the duly authorized representative of the State in which the tower site is located, has determined that a tower site located on private land lacks historic significance, and is not likely to affect any National Register eligible property, the Section 106 Review Process is completed and, assuming that there are no environmental impediments which might require the preparation of an Environmental Assessment or an Environmental Impact Statement, the tower can be constructed. No constitutional or statutory purpose is served by further THPO consultation.

The Constitution does not authorize private land use regulation by Tribal governments. Tribal governments will receive tower construction notice and can inform SHPOs of their view of whether a proposed structure would affect Tribal religious sites located on Tribal Land within the SHPO's decision making time frame. 47 C.F.R. § 1.1307(a)(5).[9] If there is disagreement with SHPO about whether Tribal land or National Register eligible Federal property is affected by the SHPO's decision, then Commission intervention could be sought by any interested party, but no

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[8] 54 U.S.C. § 300308 defines "historic property" as:

> In this division, the term "historic property" means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.

The repeated references in the *NPRM* to "historic property(ies)" must be read with an eye to the National Register eligibility requirement.

[9] The Commission cannot dictate decision making time lines to the States – the Federal government is prohibited from ordering states to implement regulatory programs in the absence of an associated exercise of the Spending Power, or by regulation of interstate commerce, or through some other grant of Constitutional power. *New York v. United States*, 505 U.S. 144 (1992). To date Montana SHPO has acted promptly and professionally and there is no reason that Tribes interested in Montana-based projects cannot work within the Montana SHPO's time line.

automatic construction stay would exist by the mere filing of a complaint about a SHPO's decision.[10]

The Commission's authority to regulate telecommunications facilities based upon historic preservation concerns is not expanded to include a general land use power merely because a Tribal authority asserts a generalized interest in privately owned land which is going to be used for the tower site.[11] *Accord Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 2016 U.S. Dist. LEXIS 121997 (D.D.C. 2016) (injunction denied where the Tribe failed to establish irreparable injury by making only generalized allegations of interest and where the Army Corps' jurisdiction specifically authorized land use regulation, but which land use jurisdiction was limited to pipeline crossing points which affected navigable waters) (slip op. at 86-87). Unlike the Army Corps, Congress has not provided the FCC with a land use power in connection with tower construction. In fact, Congress has expressly denied that power to the Commission and has confirmed that tower site land use regulation belongs to the States. *See* 47 U.S.C. § 332(c)(7) (preservation of local zoning authority regarding tower construction). *See also In the Matter of SBA Towers III, LLC Petitions to Deny and Requests for Environmental Review Against Antenna Structure Registration (FCC Form 854) with Environmental Assessment, Copper Harbor, Michigan*, 31 FCC Rcd. 1755, 1760 (Competition and Infrastructure Policy Division 2016) (tower registration granted over Section 106 objection where no suggestion was made that the tower site was eligible to be listed in the

[10] An objecting party could file an emergency motion for stay with the Commission which motion must contain substantial evidence that a Tribal or Federal property which was eligible for inclusion in the National Register of National Places might be affected by the tower project. However, generalized statements of interest and other non-specific or unsubstantiated allegations would not serve as the basis of halting construction activity and the general rule should accord SHPOs deference in the same manner that Federal agencies are presumed to operate correctly.

[11] The evidence of historic significance must be specific and in writing, it cannot be merely a generalized concern. *Sprint Nextel Corporation*, 25 FCC Rcd. 16237, 16244 (Spectrum & Competition Policy Division 2010) (approving tower construction over Tribal objection where no adverse effect was found to exist and where no record evidence to the contrary existed).

National Register as a protected historic site).

C. Short Towers Which Do Not Require ASR Registration

As part of the reconsideration Triangle requests that the Commission clarify industry confusion regarding towers which do not require ASR tower registration.[12] Short towers which do not require ASR tower registration are not required to comply with the Section 106 Review Process because construction of such towers is not a Federal undertaking. *See CTIA v. FCC*, 466 F.3d at 114 n. 4. As explained immediately below, voluntarily registration of a short tower in the ASR does not transform the tower construction project into a Federal undertaking.

The Commission currently requires FAA studies for all registered towers including short towers which are registered voluntarily in the ASR, but which otherwise would not require FAA approval. Under these circumstances obtaining FAA approval and registering the tower in the ASR are *pro forma* matters. Imposing a *pro forma* FAA clearance requirement in circumstances where such clearance is not legally required, and then classifying the result as a Federal undertaking which necessitates a substantial Federal environmental review, elevates form over substance. There is no added environmental insight gained from a superfluous, *pro forma* FAA flight safety filing which somehow transforms a low impact tower construction project into a substantial environmental undertaking. There is no real world environmental difference between an unregistered short tower and a short tower which is registered in the Commission's ASR database.

Written "substantial evidence" of a potential adverse environmental effect is the standard of evidence required to raise an environmental processing concern, but regarding short towers the FCC relies upon a paperwork requirement to impose additional environmental processing. *See In the Matter of SBA Towers III, LLC Petitions to Deny and Requests for Environmental Review Against*

[12] As a shorthand reference in these comments, towers which do not require ASR registration are referred to as "short towers."

Antenna Structure Registration (FCC Form 854) with Environmental Assessment, Copper Harbor, Michigan, 31 FCC Rcd. 1755, 1759 & n.2 (Competition and Infrastructure Policy Division 2016); *In the Matter of Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073 ¶ 41 (FCC 2004), *stay denied*, *CTIA v. FCC*, 2005 U.S. App. LEXIS 11080 (D.C. Cir., June 10, 2005), *rev. den.*, *CTIA v. FCC*, 466 F.3d 105 (D.C. Cir. 2006); *Wireless Telecommunications Bureau Announces Execution Of Programmatic Agreement with Respect to Collocating Wireless Antennas on Existing Structures*, 16 FCC Rcd 5574 ¶¶ III.A.4, IV.A.4, V.A.4 (FCC 2001). Yet in the case of short towers which are voluntarily registered in the ASR the Commission imposes added environmental review merely because the Commission requires an unnecessary FAA filing. The Commission's inconsistent reasoning on this point does not appear to have been an issue in *CTIA v. FCC*.[13]

While the filing of an air study registration form with the FAA might be a factor in determining whether a project is a "Federal undertaking," *CTIA v. FCC*, it cannot be the determining factor. The Section 106 Review Process deals with substantial demonstrations of real world environmental impacts or anticipated real world impacts, not bootstrapped nonexistent environmental concerns which arise merely from regulatory paperwork filing requirements. Whether a tower project has a potentially significant ground-based environmental impact does not in any way hinge on the FAA's study of a nonexistent flight safety risk. Put another way, air safety is not rationally related to ground-based environmental concerns.[14] Moreover, 54 U.S.C. § 300101

[13] Section D below discusses prior Commission determinations that ground disturbances related to tower construction are environmentally insignificant and not communications related and that, therefore, such ground disturbances are not Federal undertakings.

[14] While tall tower height and lighting might affect migratory birds, *American Bird Conservancy, Inc. v FCC*, and a requirement to file an FAA air safety study might be a reasonable proxy to trigger some review of airborne environmental factors, FAA tower height regulation is not rationally related to the likelihood of encountering ground-based environmental factors.

"encourages," but plainly does not require, private parties to consider historic preservation, yet the "Federal undertaking" rubric is applied in such a manner that private parties must consider historic preservation and endure an endless regulatory morass. The Commission should revisit its thinking on the short tower issue and eliminate the needless environmental processing requirement it imposes upon voluntarily registered short towers by reprogramming its ASR computer either to stop requiring submission of FAA flight safety study numbers or to ignore a submitted FAA flight safety study number for a short tower for purposes of environmental review.[15]

D. The Commission's Section 106 Review Process Is Arbitrary and Capricious

The *Report and Order* (*Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*), 20 FCC Rcd 1073, 1074 (2004) attempts to "tailor and streamline procedures for review of certain Commission undertakings for communications facilities under Section 106 . . .." Reaching toward that laudable end the Commission determined that given the "very small area" used by tower anchoring mechanisms, it is not necessary to perform a field survey prior to tower construction because installation of the tower anchoring mechanisms could cause only a "minimal amount of damage to archeological resources." 20 FCC Rcd. at 1121.[16] Moreover, the Commission has determined that site preparation for tower installation, including site clearing, anchor and tower base installation, and on site building construction have no intrinsic radio communication use and are not part of radio station

[15] To the extent that 40 C.F.R. § 1508.18(b)(4) is read to mean that a "Federal undertaking" includes Federal decisions which do not at least indirectly implicate an environmental concern, then § 1508(b)(4) stretches Federal regulatory authority past the breaking point.

[16] For reasons unknown, every tower project has come to require significant environmental review despite this clear Commission guidance to the contrary. It is conceivable that some tower project might change terrain in a substantial manner such that a Federal interest might be implicated, 47 C.F.R. § 1.1307(a)(7) (significant change in surface features affecting Federal property), but that is the exception, not the norm. The Commission has already recognized the minimal ground disturbance occasioned by tower construction as a general principle and should clarify the point.

construction.[17] *In the Matter of MCI Telecommunications Corporation*, 3 FCC Rcd. 509 (1988); *see also In re Application of Virginia RSA 6 Cellular Limited Partnership For a facility in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market 686, Virginia 6 (Highland)*, 6 FCC Rcd. 405, 406 (1991); *In re Applications of Georgia M. Brush and Jerald A. Brush D.b.a. Brush Broadcasting Co., Wauchula, Fla*., 45 F.C.C. 961, 963 (Rev. Bd. 1963).[18] Because ground preparation prior to tower erection has already been determined to be insignificant as an environmental matter and unrelated to radio communication and, therefore, not a Federal undertaking under any definition,[19] and assuming that the SHPO has approved the tower build plan, neither the Commission nor Tribal authorities has any cognizable legal interest in ground disturbances associated with tower construction regardless of the height of the tower.[20]

The *Nationwide Programmatic Agreement* expressly excludes from the Section 106 Review Process disturbances by tower builders in areas which were previously disturbed. 20 FCC Rcd. at 1091. In Montana much of the privately owned land used for tower siting has been previously disturbed by farming and ranching and tower builders on those lands should not be required to

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[17] For instance, tower anchors and tower bases could be used to mount structures to hold weather equipment, observation platforms, zip line recreation facilities, etc. Buildings and associated utilities could be used for storage, office space, camp ground, weather shelter, etc.

[18] 47 U.S.C. § 319(a) prohibits construction of radio communication facilities without a construction permit.

[19] Because ground disturbance related to tower construction is not a Federal undertaking, such disturbances do not involve a Federal license or approval under 47 C.F.R. § 1508.18(b)(4). The Commission is required to complete an environmental analysis only when a proposed action "'may' have a significant environmental effect." *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008). Since there is no Federal approval required for ground disturbances, those disturbances cannot have any potential environmental effect.

[20] Because the Commission has determined that ground disturbing activity associated with tower installation has no relation to radio communication, the Commission lacks jurisdiction over that activity.

endure regulatory delay, or pay any fees, to build towers on those previously disturbed lands. The goal of the Section 106 Review Process is not to achieve perfection, or to please a political constituency, or to assess the disposition of real or personal property in any particular manner, the goal is to consider the potential impact of a tower project on places which might be eligible for inclusion in the National Register of Historic Places. Once the SHPO determines that there is no potential impact, the inquiry is over. The Commission could greatly simplify, and significantly shorten, the tower building process merely by enforcing its current rules and issuing clarifying direction that: 1) tower construction produces minimal disturbance and 2) activity on previously disturbed land, such as ranch and farm land, is inconsequential.

The Commission should clarify that towers which do not require ASR registration are exempted from Section 106 review because such towers are not "federal undertakings." *See CTIA v. FCC*, 466 F.3d 105, 114 n. 4 (D.C. Cir. 2006). Moreover, if an ASR-exempted tower is also categorically exempted from environmental processing, 47 C.F.R. § 1.1306(a),(b), then tower construction may proceed without prior notification to SHPO, THPO, or the Commission.

E. Post-Section 106 Approval Tower Construction Monitoring Demands

A very peculiar circumstance which has arisen over the past several years, and which is becoming more common place over time, is the demand asserted by Tribes to have monitors present at tower construction sites located on privately owned land which has cleared both SHPO and THPO review. The concern is with an "unanticipated discovery" of an artifact during the construction activity. Additionally, various Tribes are demanding that tower builders pay the Tribes to send their tower construction monitors to watch earth disturbances associated with tower construction. Under these circumstances the tower site Section 106 Review Process has been completed because tower construction has been authorized by all concerned. Accordingly, the demands for paid monitoring under these circumstances are being made outside of the Section 106 Review Process. There does

not appear to be any remotely arguable justification which allows this manner of post-Section 106 Review Process demand. In this scenario, because the Tribe has asked to watch the ground disturbances associated with tower construction, the Tribe has approved the construction of the tower, the Section 106 Review Process is closed and the Section 106 Review Process cannot serve to require Tribal tower monitoring or associated construction monitoring fee payments.

Absent a substantial written showing that some historic or other environmental concern exists which would make the tower site eligible for listing in the National Register of Historic Places, a tower builder is not under any obligation to retain any person/entity, nor pay any type of fee, to monitor the tower construction.[21] 47 C.F.R. § 1.1307(a). It is impossible to have substantial written evidence relating to an "unanticipated artifact." Tower builders cannot be obstructed by something as ephemeral as a mere claim that "there might be something there."

F. The ACHP Has Authoritatively Ruled on the Tribal Fees Question

The Advisory Council on Historic Preservation long ago determined that

> While the Council's regulations encourage the active participation of Indian tribes, they do not obligate Federal agencies or applicants to pay for consultation. If an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward.

Attachment page 3 of 3 (ACHP's July 6, 2001 *Memorandum*, *Fees in the Section 106 Review Process*). The FCC does not currently have any Tribal fee regulations in place. More importantly, the Commission does not have any statutory authority to adopt a Tribal fee schedule or to otherwise require payments of fees to Tribes. Thus, to the extent the subject rulemaking explores the Tribal fee question, whether the Tribal fee demands arise in the context of the Section 106 Review Process, such as fees charged to review tower siting plans or conduct site surveys, or outside the Section 106

[21] The written record evidence concern must be specific, it cannot be a mere generalized concern. *See Sprint Nextel Corporation*, 25 FCC Rcd. 16237, 16244 (Spectrum & Competition Policy Division 2010).

Review Process, such as fees charged to monitor tower construction after SHPO approval has been obtained, the Commission cannot adopt any rule requiring fee payments of Tribal entities.[22] Moreover, the Commission has no statutory authority to establish any type of fee schedule which would allow it to impose industry negotiated Tribal fees or cost-based Tribal fees.

The ACHP, as the agency with primary jurisdiction over Section 106 Review Process, has determined that Tribes cannot demand payment for any activity relating to their Section 106 consultation participation - the ACHP considers this to be a "fundamental point." Attachment at 1-2 ("neither authority requires Federal agencies to pay for any aspect of tribal nor other consulting party participation in the Section 106 process"). *See In the Matter of Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073, 1117 (FCC 2004) (FCC "defer[s] to the Council's clearly stated interpretation of its own governing statute" citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)); *see also CTIA v. FCC*, 466 F.3d 105, 116 (D.C. Cir. 2006) (ACHP entitled to deference).

G. Artifacts Found on Private Land Have No Relation to Interstate Commerce

While communications tower construction which requires ASR tower registration could be a Federal undertaking covered by Section 106 depending upon tower height and lighting, *CTIA v. FCC*, 466 F.3d 105, 114-15 (D.C. Cir. 2006), the land and the contents of that land belong to the property owner or lease holder.[23] Even if an "unanticipated discovery" were made on private land

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[22] A Commission requirement that tower builders bear the Tribal fee cost of implementing Section 106 would be an unconstitutional overreach because it unfairly burdens a class of businesses by requiring them to foot the bill for the national interests advance by Section 106. *Cf. Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653 (1948). Moreover, Congress has not provided the Commission with statutory authority to levy any type of fees associate with the Section 106 Review Process, fees which the ACHP has explicitly denied.

[23] *CTIA v FCC* does not discuss the Commission's decades old rule that ground disturbance occasioned by tower construction is not communications-related activity. *In the Matter of MCI Telecommunications Corporation*, 3 FCC Rcd. 509 (1988); *see also In re Application of Virginia*

where a communications tower is erected, any such discovered items would belong to the property owner/lease holder who is under no statutory obligation to anything specific with that property. The Section 106 review process does not require that Tribes must be satisfied with the results of the review process, the Section 106 review process requires that Tribes be consulted ***before*** undertaking a Federal project. *See Sprint Nextel Corporation*, 25 FCC Rcd. 16237 (Spectrum & Competition Policy Division 2010) (tower projects approved over Tribal objection); *Final Programmatic Environmental Assessment for the Antenna Structure Registration Program* (PEA),[24] WTB, §5.4.4 Cultural Resources, March 13, 2012 ("The law does not mandate preservation of historic properties; rather, it mandates that Federal agencies consider the effect of their undertakings on historic properties"), *adopted*, *In the Matter of Michigan Public Safety Communications System Public Safety Towers*, *Memorandum Opinion and Order*, 30 FCC Rcd. 1719, 1721 n.17 (FCC 2015).

The Federal government, including the Commission and Congress, lacks the Constitutional authority to regulate a private landowner's real and personal property which are wholly unrelated to interstate commerce. If a private property landowner were merely digging holes on the land, such activity would not be a Federal undertaking and no Section 106 review process would be required.[25] A Federal undertaking arises because the landowner plans to construct an instrumentality of

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RSA 6 Cellular Limited Partnership For a facility in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market 686, Virginia 6 (Highland), 6 FCC Rcd. 405, 406 (1991); *In re Applications of Georgia M. Brush and Jerald A. Brush D.b.a. Brush Broadcasting Co., Wauchula, Fla*., 45 F.C.C. 961, 963 (Rev. Bd. 1963). Therefore, the ground preparation associated with tower construction is not a Federal undertaking.

[24] The PEA responds to the D.C. Circuit's ruling in *American Bird Conservancy v. FCC*, 516 F.3d 1027 (2008). https://www.fcc.gov/general/programmatic-environmental-assessment-pea

[25] A tower builder building on private property could avoid Section 106 altogether by digging/trenching/clearing/installing equipment before any Federal permits were sought. As discussed above, the Commission must consider that these activities are permitted without imposition of the Section 106 Review Process where the land has been previously farmed, ranched, or otherwise disturbed already.

interstate commerce, namely a communications tower.[26] However, the Federal Government's authority under the Interstate Commerce Clause of the Constitution is not limitless and private property which is wholly unrelated to the purpose of the Interstate tower project does not become Federal property, or subject to Federal control, merely because the Federal or a Tribal government is interested in some artifacts which might exist on the private property. *United States v. Morrison*, 529 U.S. 598 (2000) (providing victims of domestic assault with a Federal right to sue their attackers was unrelated to interstate commerce and unconstitutional even though the Federal government was interested in the subject); *United States v. Lopez*, 514 U.S. 549 (1995) (a handgun possessed in a school district is no longer a part of interstate commerce).

Any "unanticipated artifacts" which might be on private property, or buried under it, are not in any way related to interstate commerce – they were neither manufactured nor moved through interstate commerce nor are they any part of a telecommunications operation, therefore, those properties are beyond Federal regulatory reach. This is confirmed by the Commission's long standing precedent discussed above which holds that the ground disturbing activity associated with tower construction is not communications related activity. *In the Matter of MCI Telecommunications Corporation*, 3 FCC Rcd. 509 (1988); *see also In re Application of Virginia RSA 6 Cellular Limited Partnership For a facility in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market 686, Virginia 6 (Highland)*, 6 FCC Rcd. 405, 406 (1991); *In re Applications of Georgia M. Brush and Jerald A. Brush D.b.a. Brush Broadcasting Co., Wauchula, Fla.*, 45 F.C.C. 961, 963 (Rev. Bd. 1963).

Resolution of the artifacts issue is easier here than *Lopez* because any "unanticipated artifacts" which might exist on the property did not arguably move through interstate commerce at

[26] *See* 47 U.S.C. § 151 (the Communications Act exists to "regulat[e] interstate and foreign commerce in communication").

any time, they are not arguably a current part of interstate commerce, and they will not arguably become a part of interstate commerce during tower construction or operation of the communications facilities associated with the communications tower. Unanticipated artifacts found on privately owned land have absolutely no relation to the Federal undertaking of erecting and utilizing a communications tower and those artifacts are beyond the Federal governments reach. To the extent that the Commission or Congress attempts to regulate land use on the basis of "unanticipated discoveries" located on private land they stray far from the Constitutional authority to regulate interstate commerce and they intrude upon the States' prerogative to regulate private property. It is noted, with more than passing interest, that where high intensity lighting might be a concern in residential neighborhoods, the issue is controlled by local zoning. 47 C.F.R. § 1.1306(b)(2); § 1.1307(a)(8); *see also* 47 U.S.C. § 332(c)(7) (preservation of local zoning authority regarding tower construction).

The Constitution does not provide the Federal government with a general regulatory power over private land use. Congress/FCC cannot exercise control over private property merely because there is a treaty with a Tribe any more than Congress/FCC could control private property because there might be a treaty with Great Britain or France or Spain. The Treaty Power is not an expansion of Federal power beyond the power to make Treaties; Federal power is limited to those powers enumerated in the Constitution. In other words, Congress could not reinstate the *Lopez* handgun law by making that law part of a treaty or nor could Congress require the quartering of soldiers in homes by enacting a treaty with Great Britain which tried to authorize that. Even if the ground disturbance associated with a tower construction project on private property were a Federal undertaking, any items which might already exist on the property cannot be Federally regulated through Section 106 because those items have absolutely nothing to do with interstate commerce, the operation of a radio

facility, or any other Federal power enumerated in the Constitution.[27]

Conclusion

There are eleven reasons to significantly truncate and/or exempt tower construction from the Commission's Section 106 Review Process using **existing** legal precedent:

1) The Commission determined decades ago that ground disturbance associated with tower construction was not communications-related activity and the Commission, therefore, has disclaimed jurisdiction over ground disturbing activity. *In the Matter of MCI Telecommunications Corporation*, 3 FCC Rcd. 509 (1988); *see also In re Application of Virginia RSA 6 Cellular Limited Partnership For a facility in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market 686, Virginia 6 (Highland)*, 6 FCC Rcd. 405, 406 (1991); *In re Applications of Georgia M. Brush and Jerald A. Brush D.b.a. Brush Broadcasting Co., Wauchula, Fla*., 45 F.C.C. 961, 963 (Rev. Bd. 1963). Therefore, the Commission should clarify that ground disturbing activity associated with tower construction is not an issue in the Commission's Section 106 Review Process.

2) The Commission's 2004 *Nationwide Programmatic Agreement*, 20 FCC Rcd. at 1121-22, determines that installation of tower anchoring mechanisms creates only minimal ground disturbance and performing field tests for the tower is unnecessary. Therefore, the Commission should clarify that ground disturbing activity associated with tower construction is not an issue in the Commission's Section 106 Review Process except under extraordinary circumstances e.g., 47 C.F.R. § 1.1307(a)(7).

3) The *Nationwide Programmatic Agreement*, 20 FCC Rcd. at 1091, determines that previously disturbed land is exempted and the Commission should clarify that the exemption extends

[27] Artifacts buried in the ground on a small parcel of property used for a tower site construction are not a threat to any neighboring State unlike air and water pollution, for instance, which by their nature move and are capable of crossing state lines.

to ranch and farm lands and that ground disturbing activity in these locations should not be an issue in the Commission's Section 106 Review Process.

4) The text of the NHPA plainly states that the statute exists to regulate Federal property, but merely "encourages" private parties on private land to consider historic issues and does not impose any obligation on private parties to do anything notwithstanding an administrative classification of a project as a "Federal undertaking." 54 U.S.C. § 300101. Therefore, tower construction on privately owned property is not a Section 106 issue with respect to ground disturbing activity.

5) The Commission has determined that the NHPA "does not mandate preservation of historic properties; rather, it mandates that Federal agencies consider the effect of their undertakings on historic properties."[28] *In the Matter of Michigan Public Safety Communications System Public Safety Towers*, *Memorandum Opinion and Order*, 30 FCC Rcd. 1719, 1721 n.17 (FCC 2015). The Federal government has a "mandate" regarding Federal properties, but that "mandate" does not extend to private land owners who are merely "encouraged" under the statute to consider historic implications. The Commission's current interpretation of "Federal undertaking" impermissibly bootstraps Federal property preservation concerns onto private land owners.

6) Towers which do not require ASR registration are exempted from the Section 106 Review Process – *CTIA v. FCC*, 466 F.3d 105, 114 n. 4 (D.C. Cir. 2006) even if they are voluntarily registered in the ASR because such projects are not "Federal undertakings" under any definition of that term except through the bootstrapping of an unnecessary FAA approval requirement.

7) The Commission should clarify that a proposed tower which is not required to be registered in the ASR by reason of exemption from FAA air safety filing requirements, which is also categorically exempted from environmental processing, 47 C.F.R. § 1.1306(a),(b), then tower

[28] "Historic properties" means properties eligible for inclusion in the National Register of Historic Places. 54 U.S.C. § 300308.

construction may proceed without prior notification of any kind to SHPO, THPO, or the Commission.

8) The Commission should clarify that the filing of an FAA air safety study does not in any way indicate that there are ground-based environmental concerns nor does the filing of an FAA air safety study trigger any ground-based environmental review requirements. The Commission's concerns with tower impacts upon migratory birds are adequately addressed by the Commission's environmental rules which consider tower height and tower lighting and potential avian hazard.

9) There is no Federal power which authorizes the Federal government to interfere with the States' prerogative to regulate private land holdings because neither interstate commerce, nor any other Federal power enumerated in the Constitution, is implicated by private property. Moreover, the things found on or in privately owned land are not related to interstate commerce or the operation of a radio facility.

10) If SHPO, as the representative of the States in the exercise of their land use powers, determines that private land does not affect any property eligible for listing in the National Register, the Section 106 process terminates. Commission review is available if a party disagrees with the SHPO's finding, but merely filing an appeal does not automatically stay the SHPO's decision and the appeal must be based upon written substantial evidence that the tower construction project might have an adverse effect upon a property eligible for listing in the National Register of Historic Places.

11) The Commission should clarify that a regulatory scheme which requires private parties to negotiate with, and to enter into agreements with, sovereign nations regarding private property use and rights, concerns that neither the Federal government nor the sovereign nation have legal authority over pursuant to the 10th Amendment of the Constitution, is unreasonable for violating the Federalism principle embedded in, and protected by, the Constitution.

WHEREFORE, in view of the information presented herein, it is respectfully submitted that the public interest would be served by clarifying the Section 106 Review Process as discussed herein.

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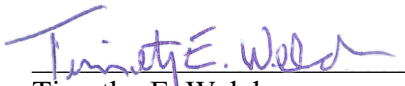
June 15, 2017

Respectfully submitted,
TRIANGLE COMMUNICATION SYSTEM, INC.



Timothy E. Welch
Attorney for Petitioner

Advisory Council On Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, DC 20004

MEMORANDUM

July 6, 2001

To: Federal Preservation Officers
Tribal Historic Preservation Officers
State Historic Preservation Officers
Indian Tribes

From: Executive Director

Subject: Fees in the Section 106 Review Process

There has been a growing concern about the practice of certain parties charging fees from Federal agencies or their applicants for their participation in the Section 106 process. In particular, the issue has emerged in the context of Indian tribes and their participation in the process. While the question of fees has many dimensions that will require more detailed attention over the long term, this memorandum is intended to provide some immediate guidance on the current tribal issue.

Background. The concern that has arisen centers around requests by Indian tribes to be compensated for activities connected to the Section 106 process. To address the issue, there are certain fundamental points that need to be acknowledged:

- Neither Section 106, 16 U.S.C. § 470f, nor the Council's regulations, 36 C.F.R. Part 800, require a Federal agency to engage anyone to provide data or information for Section 106 compliance. While the agency does have an obligation to obtain necessary information to fulfill its legal duties, it has full discretion regarding the means used to meet this obligation.

- Neither Section 106 nor the Council's regulations impose a duty on an applicant for Federal assistance or approval to develop information and analyses for Section 106 compliance or to engage contractors to so do. If a Federal agency has the authority to impose the development of such information and analyses on the applicant and chooses to do so, the legal basis for that obligation on the applicant lies in the Federal agency's authorities and does not derive from the Council's regulations.

- The National Historic Preservation Act (NHPA) does obligate a Federal agency to consult

with Indian tribes that attach religious and cultural significance to historic properties when the agency's undertakings will affect such properties. The Council's regulations specify how that consultation takes place.

- The NHPA and the Council's regulations authorize Federal agencies to contract with others, including Indian tribes, to provide information for complying with Section 106, and encourage agencies to actively involve Indian tribes in the Section 106 review process. However, neither authority requires Federal agencies to pay for any aspect of tribal nor other consulting party participation in the Section 106 process.

The role of Indian tribes in the Section 106 process. An underlying policy of the NHPA and the Council's regulations is that historic resources of significance to Indian tribes deserve full consideration in the Federal planning process and that Indian tribes possess a special perspective on and relation to these resources. This policy finds expression in provisions of the Section 106 regulation that encourage agencies, when identifying historic properties, to seek information from Indian tribes on those historic properties that have religious and cultural significance to them and that establish a consultative role for Indian tribes, both on and off their tribal lands, which provides them an opportunity to make their views known throughout the Section 106 process. These two tribal roles are not treated the same when it comes to compensation, although the line between them may not be sharp.

Facilitating tribal participation. At the outset, it must be stressed that the Council encourages Federal agencies to take the steps necessary to facilitate tribal participation at all stages of the Section 106 process. These steps may range from scheduling meetings in places and times that are convenient for Indian tribes to paying travel expenses for participating tribal representatives. Indeed, Federal agencies are strongly encouraged to use resources, consistent with their authorities, to overcome financial impediments that Indian tribes may have to effective participation in the Section 106 process. Likewise, applicants for Federal assistance that assume responsibilities for carrying out Section 106 functions are urged to do the same. However, this encouragement by the Council is not a legal mandate nor does any portion of the NHPA or the Council's regulations require an agency or an applicant to pay for any form of tribal involvement.

Tribal consultation. Throughout the Section 106 process, the regulations impose on Federal agencies (and applicants who assume an agency's duties) an obligation to consult with Tribal Historic Preservation Officers and Indian tribes. These occasions range from the initial scoping of Section 800.3, through the identification, evaluation and effect assessment of Sections 800.4 and 800.5, to the resolution of adverse effects in Section 800.6. The purpose of this role is to give the Indian tribe an opportunity to get its interests and concerns before the agency. In these situations, the Federal agency obligation is to seek and consider the views of participating Indian tribes. This means it must make an effort to solicit a tribe's opinions and factor them into the decisions that the agency must make on the project. The consultation requirement thus gives an Indian tribe the ability to advocate the outcome it would like to see the agency ultimately take in the final project decision.

When the Federal agency or applicant is seeking the views of an Indian tribe to fulfill the agency's

legal obligation to consult with a tribe under a specific provision of the Council's regulations, the agency or applicant is not required to pay the tribe for providing its views. If the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.

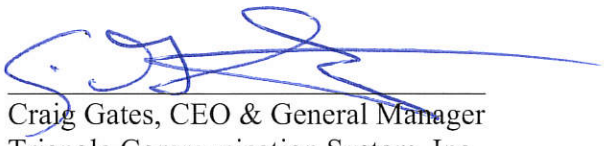
When payment is appropriate. When, during the identification phase of the Section 106 process, an agency or applicant seeks to identify historic properties that may be significant to an Indian tribe, it may ask for specific information and documentation regarding the location, nature, and condition of individual sites, or actually request that a survey be conducted by the tribe. In doing so, the agency essentially asks the tribe to fulfill the role of a consultant or contractor. In such cases, the tribe would seem to be justified in requiring payment for its services, just as any other contractor. The agency or applicant is free to refuse, but retains the obligation for obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on the historic properties. Ultimately, the Federal agency must be able to demonstrate that it made the "reasonable and good faith effort" that Section 800.4(b) of the Section 106 regulations requires.

Summary. While the Council's regulations encourage the active participation of Indian tribes, they do not obligate Federal agencies or applicants to pay for consultation. If an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward. If, on the other hand, the agency or applicant seeks information or documentation that it would normally obtain from a professional contractor or consultant, they should expect to pay for the work product. When the line between the two is unclear, the agency or applicant is encouraged to act in a manner that facilitates, rather than impedes, effective tribal participation in the Section 106 process.

John M. Fowler

CERTIFICATION

I hereby certify under penalty of perjury that I have reviewed the foregoing *Comments of Triangle Communication System, Inc.*, that I have personal knowledge of the facts stated therein, and that the information contained therein is true and accurate to the best of my knowledge, information, and belief.



Craig Gates, CEO & General Manager
Triangle Communication System, Inc.

June 15, 2017